Supreme Court, U. S.
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80-58

In the Supreme Court of the United States

October Term, 1980
No.

FRANCES DREIER,

Petitioner

vs.

GEORGE T. YANIK, CHARLES FLANNERY, MARTIN F. FLAHERTY, HARRY A. LIPFERT, HENRY R. MANARSKI, MICHAEL B. RUSHTON, EDWARD J. YANKOWSKI and ANTHONY J. MUSARI, Individually and in Their Capacity as Directors of the Wilkes-Barre Area School District

and

WALTER SEROKA, Individually and in His Capacity as Personnel Director of the Wilkes-Barre Area School District

and

LEO SOLOMON, Individually and in His Capacity as Superintendent of the Wilkes-Barre Area School District

and

WILKES-BARRE AREA SCHOOL DISTRICT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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WILKES-BARRE AREA SCHOOL DISTRICT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

FRANCES A. DREIER, the petitioner, herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above entitled case on March 24, 1980.

OPINIONS BELOW

The March 24, 1980 judgment order of the Court of Appeals is unreported and is printed in Appendix hereto; infra, at page 3a. The April 15, 1980 opinion of the Court of Appeals denying petitioner's petition for rehearing, also unreported, is printed in Appendix, attached hereto, infra, page 1a. The June 29, 1979 Court's ruling from the Bench at the conclusion of hearing of the United States District Court for the Middle District of Pennsylvania, also unreported, is printed in Appendix hereto, infra, at page 5a.

JURISDICTION

The judgment order of the United States Court of Appeals for the Third Circuit (Appendix, infra, page 3a) was entered on March 24, 1980. A timely petition for rehearing was denied on April 15, 1980 (Appendix, infra, page 1a). The jurisdiction of the Supreme Court is invoked under 28 U.S.C.A. §1254(1).

QUESTION PRESENTED

Whether the hiring policies of respondent school district in regard to supervisory and administrative positions were discriminatory against female applicants as evidenced by the markedly subjective selection criteria utilized for said positions and the disproportionately low number of females hired.

STATUTORY PROVISION INVOLVED

The statutory provision involved is 42 U.S.C. §2000e-2 which provides in pertinent part:

"Unlawful employment practices—Employer practices

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex or national origin."

STATEMENT OF THE CASE

This case involves allegations of discrimination against members of the female sex in hiring practices for supervisory and administrative personnel in respondent school district pursuant to 42 U.S.C. 2000e-2(a) (Title VII of the Civil Rights Act of 1964.)

Petitioner, Frances A. Dreier is a 49 year old white female presently employed as a secondary school librarian at Plains Junior High School in the Wilkes-Barre Area School District in Wilkes-Barre, Pennsylvania. Petitioner was originally appointed an elementary librarian with the Wilkes-Barre School District, predecessor of respondent, on September 10, 1968.

In July, 1971, the Wilkes-Barre School District was dissolved when it merged with two neighboring districts, Wilkes-Barre Township and Plains, to form the Wilkes-Barre Area School District (N.T. 206). At that time petitioner was not advised of the need to reapply for her position for the school term following the merger and thus did not do so (N.T. 308-309). On September 7, 1971, a male was hired for the sole remaining elementary librarian position (three such positions having been eliminated at the time of the merger). This occurred in spite of the fact that petitioner and the one female who did apply for the position had higher educational degrees, greater work experience and more favorable recommendations than did the individual who was hired (N.T. 16-31).

At that time, petitioner and the three remaining female librarians were reclassified as reading tutors in spite of the fact that all lacked requisite certification in this area (N.T. 211, 294).

This event prompted petitioner's initial complaint with the Equal Employment Opportunity Commission, filed on October 21, 1971. At that time, the applicable statute, 42 U.S.C. §2000e et seq. (Title VII of the 1964 Civil Rights Act) did not encompass municipal corporations and hence the charge was administratively dismissed. Title VII was subsequently amended by Congress to cover such defendants effective March 24, 1972 (N.T. 7-9).

In October, 1971, petitioner, then a reading tutor, applied for any position as a secondary school librarian which might become vacant. Two such vacancies did indeed arise and on May 10, 1972 they were advertised for the following school term. In September, 1972, both positions were filled, one by transferring the aforementioned male librarian originally hired on September 7, 1971; the second by transferring an incumbent female science teacher. Extensive testimony by Mr. Edward McCaffrey, Equal Opportunity Specialist for the EEOC, revealed that petitioner's credentials were superior to those of the two individuals selected for these positions (N.T. 32-44).

Testimony of Nancy M. Noonan, Vice President of the Pennsylvania State Education Association and a former employee of the Wilkes-Barre Area School District, related an incident which occurred in May, 1972. This incident involved a conversation between

herself and the then Director of Personnel of respondent school district wherein the Director stated that the school board would not promote the petitioner because of problems she had caused in the school district by filing charges and grievances; that the school board did not like being embarrassed in such a way; and that petitioner's career would be dead if she didn't drop these charges (N.T. 420-421). These remarks are most significant in that they occurred between the time of petitioner's initial filing with the EEOC in October, 1971 and the aforesaid hiring of the two secondary librarians in September, 1972.

Petitioner filed a second charge with the EEOC on July 14, 1972, alleging the same continuing violation as in the original filing. She subsequently filed an amended charge on December 27, 1972 containing the following allegations:

> (1) Reclassification and demotion of female librarians and replacement with a less qualified male without notice to or consideration of petitioner;
>
> (2) Retaliating against petitioner for filing a charge of employment discrimination;
>
> (3) Providing different terms and conditions of employment for males and females;
>
> (4) Maintaining sex-segregated job classifications;
>
> (5) Denying female employees equal employment benefits, and
>
> (6) Using sex-segregated work assignments (N.T. 9).

On March 1, 1974, Petitioner was appointed a secondary school librarian at Plains Junior High School, the position she presently holds. Beyond this, the conciliation efforts of the EEOC were largely ineffective. On September 17, 1974 the Commission issued its decision with a finding of probable cause regarding the issues of retaliation and sex-segregated administrative hiring (N.T. 52). Subsequent efforts to arrive at a solution were inconclusive and on January 11, 1978, petitioner was granted a right to sue letter. On April 10, 1978 she filed an action in the United States District Court for the Middle District of Pennsylvania.

The Evidence

Regarding sex-segregated administrative and supervisory hiring, testimony of Mr. Leo Solomon, presently the Superintendent of Schools of respondent Wilkes-Barre Area School District, revealed that all seven central administrators are male; 23 of 24 principals are male; and 10 of 13 departmental supervisors are male. This occurs in spite of the fact that 297 of 560 (53%) of all teachers in the district are female (N.T. 141-147, 197).

Further testimony of Mr. Solomon (N.T. 141-151) and of Mr. McCaffrey of EEOC (N.T. 45-47) revealed the selections process for the aforesaid positions to be highly subjective in nature. No formal written guidelines or job definitions were found to exist. Indeed Mr. Solomon stated that the School Board had

"unbridled discretion" in its selection of supervisory and administrative personnel (N.T. 153).

While respondents contended that certification by the Commonwealth of Pennsylvania was required for supervisory and administrative positions (N.T. 149), such requirement was apparently ignored in the case of the incumbent male Supervisor of Libraries. The Supervisor was assigned to this position in September 1971 in spite of the fact that he did not receive the requisite certification until 1975 (N.T. 46-47, 520-521).

Furthermore, the EEOC investigation concluded that the Supervisor lacked extensive experience in the library field (N.T. 45-46, 115-119).

Petitioner, Frances A. Dreier is a 1947 graduate of James Coughlin High School in Wilkes-Barre, having finished second in a class of 387. She is a 1966 graduate of College Miserecordia in Dallas, Pennsylvania, where she attained a B.S. Degree in Biology with a minor in English, graduating with a grade point average of 3.45. She subsequently earned a Master's Degree in Library Science from Marywood College in Scranton, Pennsylvania in 1968. She is certified to teach biology, comprehensive English, library science and driver training. On July 15, 1967 petitioner took the Graduate Record Examination (GRE) and attained a score of 670 on the verbal section and 540 on the quantitative (N.T. 199-205).

The Rulings Below

Following a non-jury trial from June 7, 1979 to June 13, 1979 judgment was entered on the merits in

favor of all defendants. The district court ruled, inter alia, that petitioner had established a prima facie case regarding discriminatory hiring of supervisory and administrative personnel, acknowledging petitioner's statistical data. However, the district court held that respondents overcame this presumption by showing a lack of qualified female applicants for the positions in question (App. pp. 13a-15a).

The Court of Appeals affirmed the ruling of the district court without opinion in a judgment-order dated March 24, 1980 (App. p. 3a). A petition for rehearing was timely filed and an order denying same was entered on April 15, 1980 (App. p. 1a).

REASONS FOR GRANTING THE WRIT

Certiorari Should Be Granted To Resolve Conflicts in Principle Between the Lower Courts and the Supreme Court of the United States Regarding the Quantum of Proof Necessary for a Defendant To Rebut a Prima Facie Case of Employment Discrimination Established by a Plaintiff's Statistical Evidence

The issue in this matter is the error of the district court and the Court of Appeals in finding that respondents overcame the presumption of a discriminatory practice of hiring established by the statistical evidence of petitioner.

The district court conceded that petitioner had established a prima facie case regarding hiring of supervisory and administrative personnel, acknowledging the aforementioned statistical data which showed gross disparities in the number of females employed in these higher-paying, more desirable positions. However, the district court concluded that respondents overcame this presumption in that petitioner failed to show a sufficient number of qualified female applicants for these positions, noting that respondents' "uncontradicted evidence" showed only one female in the Wilkes-Barre Area School District qualified for appointment to an administrative or principal's position (App. p. 13a).

The uncontradicted evidence to which the district court refers is apparently the undocumented oral testimony of Superintendent of Schools Leo Solomon (N.T. 158-193). However, Mr. Solomon admitted that he had done no formal survey to substantiate his statements (N.T. 182-183). He further noted that applicants are not sought from outside the school district and no advertising is done outside the district (N.T. 191-192). Finally, Mr. Solomon conceded that record keeping of applications for supervisory and administrative positions, notably in regard to petitioner, is extremely sketchy if not nonexistent (N.T. 184, 192-193).

Further testimony of Mr. Solomon (N.T. 141-151) and of Mr. McCaffrey of EEOC revealed the selection process to be highly subjective in nature. Indeed, Mr. Solomon stated that the School Board had "unbridled discretion" in selection of administrative and supervisory personnel (N.T. 153).

It is well settled that in cases presenting questions of discriminatory hiring practices employment decisions based on subjective rather than objective criteria carry little weight in rebutting charges of discrimination. *Green v. McDonnell Douglas Corp.*, 463 F.2d 337, 352 (8th Cir. 1972), remanded on other grounds 93 S.Ct. 1817, 411 U.S. 792 (1973).

In reaching its decision, the district court placed great reliance on the decision of the Supreme Court in *Hazlewood School District v. United States*, 433 U.S. 299, 308, n.13, 97 S.Ct. 2736, 2742 (1977), in support of the proposition that in order to prevail the protected groups must be both qualified and interested in

the type of employment that is challenged. The district court noted that the actual applicant flow is highly relevant proof of the availability of qualified applicants and the relevant labor market (App. p. 14a).

In *Hazlewood* (supra), the Supreme Court held that the district court had erred in comparing the percentage of blacks in the school district's work force to the percentage of blacks in the student population; and that a proper comparison was between the racial composition of the district's teaching staff and the racial composition of the qualified public school teacher population in the relevant labor market.

However, in the present case, the district court narrowly limited the relevant labor market to incumbent professional employees of defendant, Wilkes-Barre Area School District, rather than a county or area-wide sampling. Furthermore, it relied on the unsubstantiated opinion testimony of the Superintendent that few females are qualified for the positions in question. Finally, it relied heavily on the virtually nonexistent applicant flow data provided by the defendants to show a lack of qualified female applicants (App. pp. 13a-15a). Clearly the district court misapplied the rationale of *Hazlewood.*

The decisions on the district court and the Court of Appeals are clearly contrary to the decision of the Supreme Court of the United States in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 97 S.Ct. 1843 (1977).

In *International Brotherhood of Teamsters*, at 342, n. 23, 1858, the Supreme Court rejected defendants' attacks on the statistical evidence of plaintiff. De-

fendants alleged, inter alia, that the statistical evidence failed to show what portion of the minority population was suited by age, health or other qualifications to hold trucking jobs. In rejecting this argument, the Supreme Court noted that defendants' attacks detracted little from the Government's showing that Negroes and Spanish-surnamed Americans who were hired were overwhelmingly excluded from the preferred, higher-paying line driver jobs and were assigned to the less desirable, lower paying city driver jobs.

Even if one concedes a lack of qualified applicants in the present case, the holdings of the district court and the Court of Appeals are still at variance with the rationale of *International Brotherhood of Teamsters* (supra). At 365, 1870, the Supreme Court stated:

> "If an employer should announce his policy of discrimination by a sign reading 'White Only' on the hiring-office door, his victims would not be limited to the few who ignored the sign and subjected themselves to personal rebuffs. The same message can be communicated to potential applicants more subtly but just as clearly by an employer's actual practices—by his consistent discriminatory treatment of actual applicants, by the manner in which he publicizes vacancies, his recruitment techniques, his responses to casual or tentative inquiries, and even by the racial or ethic composition of the work force from which he has discriminatorily excluded members of minority groups. When a person's desire for a job is not translated into a formal application solely because

> of his unwillingness to engage in a futile gesture he is as much a victim of discrimination as is he who goes through the motions of submitting an application."

In light of the rationale of the Supreme Court's opinion in *International Brotherhood of Teamsters* (supra), the respondents clearly failed to rebut the presumption of discrimination in hiring of supervisory and administrative personnel established by the overwhelming statistical evidence of petitioner.

CONCLUSION

Wherefore, petitioner respectfully prays that a writ of certiorari be granted.

Respectfully submitted,
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APPENDIX

UNITED STATES COURT OF APPEALS
for the Third Circuit

No. 79-2157

FRANCES A. DREIER,

Appellant

v.

GEORGE T. YANIK, CHARLES FLANNERY, MARTIN F. FLAHERTY, HARRY A. LIPFERT, HENRY R. MANARSKI, THOMAS L. O'DONNELL, JR., MICHAEL B. RUSHTON, EDWARD J. YANKOWSKI, ANTHONY J. MUSARI, Individually and in their capacity as Directors of the Wilkes-Barre Area School District, WALTER SEROKA, Individually and in his capacity as Personnel Director of the Wilkes-Barre Area School District, LEO SOLOMON, Individually and in his capacity as Superintendent of the Wilkes-Barre Area School District, and WILKES-BARRE AREA SCHOOL DISTRICT

SUR PETITION FOR REHEARING

Present: SEITZ, Chief Judge, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, Circuit Judges.

The petition for rehearing filed by Appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,
(s) Seitz
Chief Judge

Dated: April 15, 1980

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-2157

FRANCES A. DREIER,

Appellant

v.

GEORGE T. YANIK, CHARLES FLANNERY, MARTIN F. FLAHERTY, HARRY A. LIPFERT, HENRY R. MANARSKI, THOMAS L. O'DONNELL, JR., MICHAEL B. RUSHTON, EDWARD J. YANKOWSKI, ANTHONY J. MUSARI, Individually and in their capacity as Directors of the Wilkes-Barre Area School District, WALTER SEROKA, Individually and in his capacity as Personnel Director of the Wilkes-Barre Area School District, LEO SOLOMON, Individually and in his capacity as Superintendent of the Wilkes-Barre Area School District, and WILKES-BARRE AREA SCHOOL DISTRICT

(Civil No. 78-0340—M.D. of Pa.—Scranton)

Submitted Under Third Circuit Rule 12(6)
March 21, 1980

Before: SEITZ, *Chief Judge*, GARTH, and HIGGINBOTHAM, *Circuit Judges*.

JUDGMENT ORDER

After consideration of the contentions raised by the appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellant.

By the Court,
(s) Seitz
Chief Judge

Attest:
(s) Thomas F. Quinn
Clerk

Dated: Mar. 24, 1980

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Filed, Scranton, Pa., June 29, 1979
Donald R. Berry, Clerk, per mlp, Deputy Clerk

Civil No. 78-340

FRANCES A. DREIER, 806 North Washington Street, Wilkes-Barre, Pennsylvania

v.

GEORGE T. YANIK, CHARLES FLANNERY, MARTIN F. FLAHERTY, HARRY A. LIPFERT, HENRY R. MANARSKI, THOMAS L. O'DONNELL, JR., MICHAEL B. RUSHTON, EDWARD J. YANKOWSKI and ANTHONY J. MUSARI, Individually and in their capacity as Directors of the Wilkes-Barre Area School District

&

WALTER SEROKA, Individually and in his capacity as Personnel Director of the Wilkes-Barre Area School District

&

LEO SOLOMON, Individually and in his capacity as Superintendent of the Wilkes-Barre Area School District

&

WILKES-BARRE AREA SCHOOL DISTRICT

COURT'S RULING FROM THE BENCH AT THE CONCLUSION OF HEARING

THE COURT: Initially I'd like to put the case in proper perspective. Plaintiff has brought suit under Title VII of the 1964 Civil Rights Act, 42 United States Code, Section 2000(e), et seq. A Title VII case is divided into three phases. First, the plaintiff must demonstrate a prima facie case of discrimination. Then the defendant is called upon to articulate a legitimate nondiscriminatory reason for its action. Finally, the plaintiff is afforded an opportunity to show that the proffered reason is, in fact, a pretext designed to cover what is actually an illegal discrimination.

Under McDonnell Douglas Corporation versus Green, 411 U.S. 792, 802 (1973), a plaintiff makes out a prima facie case by showing, One, that she belongs to a protected class; Two, that she applied and was qualified for a job for which the employer was seeking applicants; Three, that despite her qualifications she was rejected; and, Four, that after her rejection the position remained open and the employer continued to seek applicants from persons of plaintiff's like qualifications.

A prima facie case under McDonnell Douglas Corporation raises an inference of discrimination because acting in such a totally arbitrary manner without any underlying reasons is more likely than not based on the consideration of impermissible factors. The burden then shifts to the employer to prove that he based his employment decision on a legitimate con-

sideration and not on an illegitimate consideration such as sex. The plaintiff must be given the opportunity to introduce evidence that the proffered justification is merely a pretext for discrimination. The act does not command that a person be hired simply because she is a member of a protected class. Discriminatory preference is precisely and only what Congress has proscribed. I cite Griggs v. Duke Power Company, 401 U.S. 424, 431 (1971).

Now, as to the initial act of discrimination, even though municipalities or school districts were not within the purview of the act when the alleged discrimination took place, the Court will consider that charge anyway.

There is no doubt that the plaintiff is qualified in Library Science. She has a Master's in Library Science, which she acquired in 1968 and she has a very impressive scholastic and academic background. The record indicates that she was hired in 1968 as an elementary librarian and that she served in such capacity with three other females largely as a result of an emphasis in federal funding directed to improvement of Library Science facilities and instruction in the Wilkes-Barre School District.

In 1971 the Wilkes-Barre School District became part of a larger district, subsequently captioned as the Wilkes-Barre Area School District, which took in other areas, other School Districts such as Plains and Wilkes-Barre Township. If there were any more I can't recall from the record. But in any event the number is not important.

In September of 1971 the school board hired Mr. Anthony George as an elementary librarian. And the four incumbent elementary librarians, including plaintiff, Mrs. Carey, Mrs. Barnick and Miss Connell were assigned to remedial reading, inasmuch as the emphasis had shifted from Library Science to remedial reading.

Mr. George had a Bachelor's Degree in Library Science and had been appropriately certified. The plaintiff contends that she was more qualified than Mr. George; that she had more credit hours and more experience; and that she was passed over in the appointment because of her sex. She points out that she had a Master's Degree; that she was carried on the Federal Program Funding as the elementary librarian; and although she did not have more time with the district than the other three female librarians she had more credit hours.

As to that appointment I believe the plaintiff has made out a prima facie case in keeping with the dictates of McDonnell Douglas and the rationale of McDonnell Douglas. Consequently, the defendant must now articulate a legitimate nondiscriminatory reason for its action.

I think it should be pointed out that the defendants consist of the present members of the Wilkes-Barre Area School Board, as well as Mr. Leo Solomon, the Superintendent of the Wilkes-Barre Area School District, and Mr. Walter Seroka, the Personnel Director of the Wilkes-Barre Area School District. I should also point out that Mr. Solomon was not the Superintendent at the time these alleged discriminatory acts

took place, but the Superintendent at the time was one Walter Wood.

By way of explaining the appointment of Mr. George, the defense contends that he had a Bachelor's Degree in Library Science, which the defense believes made him equally or more qualified than plaintiff who possessed a Master's in Library Science, with another major on the Bachelor's level. The point being made that Mr. George would have had more intensified Library Science training on the Bachelor's level, that being his major, than plaintiff would have in receiving a Master's Degree in Library Science, but with her specialty on the Bachelor's level in biology.

The plaintiff and the other three elementary librarians had certification in areas other than in Library Science, while Mr. George's sole certification was in Library Science. The defense asserts that it would be unwise, and indeed foolish to attempt to send Mr. George into remedial reading where he was not certified and because he also had no prior school teaching experience.

The defense's position is, as I understand it, that the decision to hire Mr. George was predicated upon the fact that he did have a Bachelor's Degree in Library Science, which the district was not only seeking but anxious to acquire, and that because this was his sole area of certification, this was the position to which he was assigned.

The Court concludes that the reasons articulated by the defense for the appointment of Mr. George demonstrate a legitimate nondiscriminatory reason for its action. Accordingly, the Court concludes that the

charge of sexual discrimination in the appointment of Mr. George has not been sustained.

The next incident to which the plaintiff makes reference, both by way of discrimination but principally as retaliation, is the development surrounding the resignations in 1972 of two secondary school librarians, Mrs. Dorothy Hayes and Mrs. Zalata Thuy.

Both Mrs. Hayes and Mrs. Thuy announced that they were going to resign effective June 1972, and these positions were advertised by the board in May 1972. However, in June of 1972 Hurricane Agnes hit the Wyoming Valley, and needless to say caused great destruction to school facilities and totally disabled the Meyers High School library. When school reassembled in September 1972, the school superintendent transferred Mrs. Alice Schappert from the Meyers High School library, which was closed because of the flood, to the GAR High School library from which Mrs. Hayes had resigned. The superintendent also assigned Mrs. Ann Marie Quarquio from her position as science teacher at Coughlin High School to the position of librarian at Coughlin High School, where she was certified.

Mrs. Dreier challenges these actions on the grounds that Mrs. Quarquio did not have a Master's Degree, which plaintiff did; and that Mrs. Dreier also had more Library Science credits, and more on-the-job library experience, and therefore the transfer of Mrs. Quarquio was done in retaliation for the fact that Mrs. Dreier had filed a charge with the Equal Employment Opportunity Commission in October 1971 relative to the appointment of Mr. George.

In articulating the reasons for such a transfer the defense states that Mrs. Quarquio had served at Coughlin High School since 1963 as a science teacher; that she knew the students and the faculty; and it was believed that it would be a smoother transition from someone within the school to the position of librarian. When Meyers library became ready for use, Mrs. Schappert was then returned to Meyers from GAR, and Mr. George transferred from the elementary library into the position of secondary librarian at GAR. At that point, the defense has established, Mr. George had both a Bachelor's Degree and a Master's Degree in Library Science and was the most academically qualified applicant.

The Court, after considering all of the evidence relative to this particular incident, concludes that the defense has again articulated a legitimate non-discriminatory reason for its action and that this administrative activity was not spawned by discrimination against plaintiff because of her sex or retaliation against her for filing charges with the EEOC.

The plaintiff has also related a series of incidents by supervisory personnel which she contends was harassment in retaliation for her filing the charge with the EEOC in October of 1971. She testified to harassment by Mrs. Nygren at Oliver School in Bear Creek Township; by Mr. Krause at Macken School; by Mr. Proch at Plains Junior High School; and also by Mr. Schwab at Plains Junior High School.

The harassment included not only an abnormal number of visits to the classroom while she was teaching or otherwise functioning, but a hostile attitude toward her with regard to sick leave and other

school regulations, such as leaving the school building, which were not asserted and applied to other teachers.

I find these series of charges to be totally without merit. I was completely convinced by the testimony of Mrs. Nygren, Mr. Krause, Mr. Proch and Mr. Schwab that there was no hostility demonstrated toward the plaintiff and that they were under no orders from any superior to harass or in any way attempt to intimidate the plaintiff. I believe that the plaintiff's conclusions that these people acted with an improper animus toward her were completely imagined.

The plaintiff has also alleged that she was denied summer school assignments not only because of her sex but again as a retaliatory measure. The defense has contended that the policy is to prefer in summer school appointments those with previous summer school experience and that normally there are hundreds of applicants and only 40 to 50 are hired.

The plaintiff was hired in 1968 as a summer librarian, which was the only year a summer librarian was hired, and she was also hired as needed in 1973, although an insufficient number of students enrolled for the course she was teaching, that is, English, and she did not end up actually teaching.

The defense states that the plaintiff could be hired only in Biology and English, and because she never taught Biology, and only taught English two years, there were others more experienced in the teaching of English who were selected ahead of her. I find the reasons given by the defense to be totally supported by the record.

The plaintiff has also claimed that she was retaliated against in tutorial offerings, to which the defense has responded that the practice is to utilize the regular teacher in the course that is being taught. In other words if a student requires home-bound instruction in mathematics, the teacher who regularly teaches mathematics would be the first one solicited.

The defense points out that the plaintiff's experience is primarily as a librarian and that she wouldn't be a regular teacher in any course for which tutorials are provided. Similarly, I accept this explanation by the defense as justifying the tutorial policy and demonstrating that it was not discriminatory to plaintiff or to any other female because of sex.

The plaintiff has also relied on statistical data showing the small percentage of women in administrative and supervisory positions as demonstrating a prima facie case of continuing sex discrimination against plaintiff and other females. The testimony in this regard is that while 56 percent of the professional employees in the Wilkes-Barre Area School District are women, only nine percent serve in the capacity as administrators, supervisors, principals, et cetera.

I believe this statistical data, while it may establish a prima facie case, was totally rebutted by the uncontradicted evidence that, first, there is only one female in the Wilkes-Barre Area School District who is qualified for appointment to an administrative or principal's position. And, secondly, that until the state required a certificate of specialized background, women were adequately represented in supervisory positions.

Another area of complaint is the designation of Mr. Lavin as a Supervisor of Library Science. The record discloses, however, that Mr. Lavin, even though he was not certified in 1966, was appointed Elementary Librarian Administrator in the Wilkes-Barre School District. At that time certification was not required and at that time the plaintiff wasn't even a professional employee in the district.

Mr. Lavin was then appointed Supervisor of Librarians in the Wilkes-Barre School District in 1968. And when the merger occurred, including the Wilkes-Barre School District into the Wilkes-Barre Area School District, he was named again as Supervisor of Librarians in the Wilkes-Barre Area School District, although he was not certified until 1975. I believe the explanation by the defense, especially the chronology of his service in a supervisory capacity, establishes that his appointment was not made because of any sex discrimination.

I might also point out that as to the statistical data and the argument that there's an absence of females in supervisory and administrative positions, the law does recognize that where gross statistical disparities can be shown, they alone may, in a proper case, constitute prima facie proof of a pattern or practice of discrimination.

However, the Civil Rights Act assumes that the protected groups are both qualified and interested in the type of employment that's challenged. The actual applicant flow data is highly relevant proof of the availability of qualified applicants and the relevant labor market. That's Hazelwood School District versus

United States, 433 U.S. 299, 308, n.13 (1977). As previously noted, the applicant flow in the Wilkes-Barre Area School District for administrative appointments indeed showed a small number of qualified and interested applicants of the female gender.

The most serious charge made by the plaintiff is that against Mr. Will Maguire, who was personnel director for the Wilkes-Barre Area School District in 1972. Both plaintiff and Miss Noonan have testified that Mr. Maguire had informed them that the school board would not promote the plaintiff because of problems she had caused with the school district by filing charges and grievances; that the school board did not like being embarrassed in such a way; and that plaintiff's career would be dead if she didn't drop these charges. This occurred in May of 1972 subsequent to the appointment of Mr. George as elementary librarian but prior to the administrative transfers of the secondary school librarians in September of 1972.

Mr. Maguire denies ever making such statements. He testified that the only comment he ever made to any of his superiors or to members of the school board relative to the plaintiff was to recommend against her appointment in March of 1974 as the librarian in Plains Junior High School. He said he based that adverse recommendation on his observations of plaintiff when she served temporarily in 1971 at the GAR library at the time when he was principal.

Whether Mr. Maguire made these statements to the plaintiff and Miss Noonan appears to have no controlling significance here because there is no evidence that he in any way influenced the Superintendent, Mr.

Wood, or the school board in the administrative transfers which followed as to the secondary school librarians. As a matter of fact, in March of 1974 Mrs. Dreier was appointed to the first opening as a librarian, requiring board action, since 1971.

I think it also should be mentioned that the evidence indicates, and I accept it, that except for the initial appointment of Mr. George, all of the other assignments about which the plaintiff complains were brought about through administrative action of the Superintendent, Mr. Wood. There is nothing in the record to indicate any sexual bias or animus on the part of Mr. Wood, the person, as I mentioned, who was responsible for these assignments.

Therefore, although the Court recognizes and acknowledges that plaintiff is fully qualified for the position she sought, and positions she is still seeking, she is not entitled to an order directing remedial action against the school board or any of the defendants unless it's established that their actions were performed for impermissible reasons. That is, to discriminate against her and other females because of their sex.

I believe the record and the evidence in this case does not support plaintiff's contentions and the verdict will be entered in favor of all defendants and the Clerk will be directed to enter judgment in favor of the defense.

(s) William J. Nealon
Chief Judge
Middle District of Pennsylvania

Dated: June 29, 1979.